DOCUMENT RESUME

ED 294 779 SO 018 741

AUTHOR Gilbertson, Eric R.
TITLE The Constitution and Academic Freedom.
PUB DATE 24 Nov 87
NOTE 37p.; Paper presented at the Annual Meeting of the American Association of State Colleges and Universities (New Orleans, LA, November 24, 1987).
PUB TYPE Speeches/Conference Papers (150) -- Information Analyses (070) -- Historical Materials (060)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Academic Freedom; Censorship; *Constitutional History; *Constitutional Law; Freedom of Speech; Higher Education; *Intellectual Freedom; Student Rights; United States History
IDENTIFIERS *United States Constitution

ABSTRACT

During the past 150 years U.S. courts have demonstrated a special protectiveness toward academics and academic institutions. Academic freedom was not a concern when the U.S. Constitution and the First Amendment were drafted and is not mentioned in the "Federalist Papers." However, decisions by a series of Supreme Court justices led to doctrines of constitutional interpretation related to academic matters. Academic freedom issues arose in response to what now seems to be clear abuses of authority. Today, academic freedom issues are complex and intertwined with conflict of interest, public policy, and dissent issues. The point at which academicians' limits to consitutional protection of their rights to express opinions or where speech or conduct so impairs the effective work of an institution that its interests may prevail over those of the individual have yet to be determined. Since the 1960s there has been a growing interest in students' rights. The Constitution has provided a solid base of protection against political or authoritarian interference and guarded free expression in the academic community. (JHP)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED294779

THE CONSTITUTION AND ACADEMIC FREEDOM

by

Eric R. Gilbertson

Presented to

American Association of
State Colleges and Universities
New Orleans, Louisiana
November 24, 1987

Johnson State College
Johnson, Vermont 05656

SO018741

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
ERIC R. GILBERTSON
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
✓ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

Presentation to
American Association of
State Colleges and Universities
New Orleans, Louisiana
November 24, 1987

Eric R. Gilbertson
President, Johnson State College
Johnson, Vermont

THE CONSTITUTION AND ACADEMIC FREEDOM

Surely some good has come from our year-long national celebration of the Constitution -- it had to. Earlier research had provided more illuminating insight than we needed about civic literacy in modern America, dramatizing massive public confusion (or indifference) about precisely which resonant words and phrases were found in the Constitution and which came from the Gettysburg Address.

(Some 82% of those surveyed believed that the words "of the people, by the people, and for the people" are in the Constitution. And nearly half (45%) of our surveyed fellow citizens believed that "from each according to his ability, to each according to his needs," was enshrined in our Nation's governing charter.)

But all that is changed now. The Constitution has been read aloud in myriad public ceremonies by earnest public servants and

civic minded celebrities; U.S.A. Today charitably distributed (well, sort of) copies of the Constitution (and more) to millions of schoolchildren; balloons and bombast have issued into the sky; and those 30-second television spots -- now mercifully terminated -- have more than fully satiated our ravenous national appetite for a deeper understanding of what the Constitution truly means to our better known captains of industry, pugilists and rock stars.

Amid all this commercial hype and solemn foolishness occasionally sounded a frail voice offering a perspective, an insight. Such voices were not generally welcomed, popularly judged to be insufficiently cheerful for such an auspicious occasion.

Mr. Justice Thurgood Marshall offered such a voice. He was pronounced, by some, a party-pooper.

What he said was this:[1]

> "The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the "more perfect Union" it is said we now enjoy.
>
> I cannot accept this invitation, **** When contemporary Americans cite the Constitution, they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.
>
> **** 'We the people' included, in the words of the Framers, 'the whole Number of free Persons.'

> On a matter so basic as the right to vote, Negro slaves were excluded, although they were counted for representational purposes--each as three-fifths of a person. Women did not gain the right to vote for over a hundred and thirty years.
>
> ****
>
> And so we must be careful, when focusing on the events that took place in Philadelphia two centuries ago, that we not overlook the momentous events that followed, and thereby lose our proper sense of perspective. **** If we seek instead a sensitive understanding of the Constitution's inherent defects--and its promising evolution through two hundred years of history--the celebration of the 'miracle at Philadelphia' will be a far more meaningful and humbling experience. We will see that the true miracle was not the birth of the Constitution but its life. ****"

This is not, of course, excessively irreverent towards "the Framers," men of considerable virtue and wisdom who are now receiving a full measure of credit for all sorts of results they could never have foreseen. It does their reputations no real harm to notice, with sober eye, the squalid compromise on slavery or the failure of agreement on a Bill of Rights, or to recognize that they were not devoid of human avarice and in some matters unable to divorce themselves entirely from economic or regional or class interests.

But Justice Marshall has a point: All of the genius, all of the best thinking, all of the noble and farsighted vision that has advanced and sustained our constitutional democracy did not come in

one gush in Philadelphia in 1787. Much of the credit, or blame, belongs to the people and the process that yielded the Bill of Rights two years later and the 14th Amendment some 80 years later. Much of the credit, or blame, belongs to a 200-year succession of Supreme Court Justices and the countless litigants who gave life to the sometimes ambiguous words of this instrument and who sustained that life by interpreting and applying its words to ideas and events and circumstances the Framers could not have imagined.

So it is with the concept of freedom of expression. And so it is with the concept of academic freedom, now accorded a certain protection under the Constitution.

* * *

Academic freedom theorists -- or purists -- have been looking at the Constitution lately and finding the glass half empty. It is true, by some broad definitions of "academic freedom," the protection accorded by the Constitution may seem minimal.

To the extent, for example, that someone's notion of "academic freedom" does or should protect timorous faculty from disclosing assessments made in a peer-review process, the Constitution and the

courts have offered little help, sometimes finding instead a superior public interest in determining the presence or absence of race or sex discrimination.[2,3]

Still, the glass is also half full. Courts have, by doctrines evolving over nearly 150 years, evidenced a special protectiveness toward academics and academic institutions.

Few of the Framers of the Constitution were academics. Thirty-four of the 55 were lawyers; 27 were farmers -- some doubling as lawyers -- and 19 were slave holders.[4] But the Virginia delegation did include a Law Professor (George Wythe) and a Professor of Medicine (James McClurg).

Still it is fair to assume that academic freedom did not weigh heavily on their minds in 1787. As they debated the purposes of government, little or nothing was said about education. Only James Wilson apparently disagreed with the notion that the protection of property was the "sole or primary" purpose of government, arguing that "the cultivation and improvement of the human mind was the most noble object" of government and society.[5]

Several -- Madison, Washington, Wilson and Pinckney -- did

propose to establish a "national university" to prepare the best of American youth for national service. Their purpose, however, was more likely to ensure that government would conform to existing morals and manners -- not to provide a source of critical thinking.[6]

And academic freedom was not likely a specific concern even as the 1st Amendment was crafted.. The Federalists Papers are quiet about such matters. And, as Robert Bork argued in the 1971 article that has since haunted him, it is likely the 1st Amendment was intended to protect only a narrow sort of political expression -- not literary expression, nor artistic expression, nor the advance of science, nor the free exchange of information.

Restraints and limitations on speech were well accepted in the early days of the Republic. In 1776, Congress urged the States to pass laws to prevent the populace from being "deceived and drawn into erroneous opinion," and virtually every state had done so by 1778.[7]

Indeed, the 1st Amendment itself proscribed only actions by the federal government, providing no protection from the States until, by a series of judicial decisions, freedom of expression was found buried

somewhere in the "liberty" clause of the 14th Amendment. And that was not until well into this century.

But while the Framers thought little about academic freedom, over the ensuing two centuries a series of Supreme Court Justices gave birth to doctrines of constitutional interpretation that evidenced a quite extraordinary interest in academic matters.

Several Justices had spent tours of duty in the "halls of ivy." Felix Frankfurter, a Harvard professor just prior to his appointment to the Court, was perhaps the most prominent academician to serve in the Court this century. Holmes, Douglas, and now Antonin Scalia, also served time on faculties. And Justice Powell had extensive experience in public school matters, and the most recent proposed appointee, Judge Kennedy, is still active on a law faculty.

The idea of a "constitutional academic freedom" may have been trivialized, from time-to-time, during the floodtide of litigation involving colleges and universities over the past three decades. Courts have been required to reject for example, a faculty member's

argument that his "academic freedom" was violated when student complaints were used in a decision not to renew his appointment,[8] and arguments that "academic freedom" was violated when a faculty member was dismissed for refusing to comply with university grading policies,[9] or for the use of profane language in the classroom,[10] or for pursuing purely personal grievances.[11]

And most recently, in Edwards vs. Aguillard,[12] the Supreme Court struck down a "creationism" law which sought, according to a dubious argument by Louisiana, to advance "academic freedom" by giving teachers flexibility to "supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life."

But the 1st Amendment has been held to prohibit the U.S. Secretary of State from preventing a controversial (Palestine Liberation Organization) speaker from traveling within the United States to participate in political debates. In that case, professors and students successfully contended that they had a right to hear such an exchange of ideas.[13]

And the Constitution has been held to prohibit intrusion into classrooms by undercover police agents, assigned to report on discussions they had observed.[14]

And it has also been held that the 1st Amendment does protect the right of students to erect even "unsightly" shanties on a campus to protest investment policies of the institution,[15] does prevent the cancellation of a film series because of political pressures,[16] does prevent the withdrawal of funding for a student newspaper that had published indelicate material.[17,18]

* * *

While its origins are traced, at least ostensibly, to the freedom of students to choose courses and the freedom of faculty to peddle learning in nineteenth century Germany, support for academic freedom in the United States arose in response to what seem now to be clear abuses of authority.

There were halcyon, early 20th century days when presidents reigned supreme on campuses. In such a time, the President of the University of Pennsylvania explained why he fired a radical from his

faculty: "If I am dissatisfied with my secretary, I would suppose I would be within my rights in terminating his employment."[19] Likewise, Stanford University summarily fired an economist who had the temerity to anger Mrs. Leyland Stanford by his speeches on Chinese immigration.[20]

How far things have come. Issues of academic freedom seem staggeringly complex now, intertwined with issues of conflict of interest, (as in research relationship with the private sector), issues of public policy, (as in the case of honorary degrees or academic appointments for political figures), issues involving dissent from dissent, (to prevent, in the name of free speech, others from exercising their right to speak).

The first glimpse of a constitutional doctrine on academic freedom might be seen in the celebrated 1819 Dartmouth College case.

This controversy is best remembered for the oratory of Daniel Webster ("Tis a small College, sir, but there are those of us who love her."). The Legislature of New Hampshire had sought to take over that institution on the grounds that its charter from the British Crown had been invalidated by the Revolutionary War.

Webster's arguments raised squarely the need for a public policy to protect the independence of such institutions. Justice Marshall, in striking down the New Hampshire Act, observed that:

> "It is probable that no man ever was, and no man ever will be a founder of a College, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the Legislature."[21] (at p. 645)

Thus the Supreme Court recognized early that the academy was special, deserving protection from political interference.

The Dartmouth College case was followed in 1844 by Vidal vs. Girard's Ex'rs.[22] Here, again, the Court found that educational institutions warranted extraordinary protection -- even if those institutions openly espoused values that ran afoul of popular religious or political thought, in this case a ban on clergy teaching at the school.

Later, in 1904, however, the Court was less inclined to protect an academic institution from unpleasant public opinion.[23] A Kentucky statute prohibited the instruction of blacks and whites in the same

institution. Berea College -- founded by an ardent abolitionist group -- was convicted under that law. The conviction was upheld on the grounds that the State had an interest in discouraging interracial marriage and preventing racial disharmony.

Parenthetically, that case provides a useful reminder and perhaps a grim prophecy that human institutions -- such as the Supreme Court -- will never be oblivious to social and political forces around them. The lifetime tenure afforded Supreme Court Justices by the Constitution has permitted the Court to move out of step with popular opinion for a time, but rarely for long. As Mr. Dooley observed: "No matter, whether the Constitution follows th' flag or not, Th' Supreme Court follows th' iliction returns."

* * *

This general solicitude evidenced early by the Court for colleges and universities was slow in evolving to a more specific concern for academic freedom. But what has evolved is a constitutionally-based protection for the rights of individuals within academic institutions and even for institutions themselves.

The 1950's provided the first real tests for academic freedom in a constitutional context, often involving conflicts between individual academics and both their institutions and external forces.

One important case involved the summary dismissal of a tenured college instructor for refusing to answer a legislative committee's questions concerning Communist Party membership. The Supreme Court held that while public authorities were permitted to scrutinize a person's fitness to hold a public position, the refusal to answer questions "admittedly asked for purposes wholly unrelated to his college functions" provided no permissible basis for discharge.[24]

Shortly thereafter, in what was to become a landmark decision, Sweezy vs. New Hampshire,[25] the Court was faced with the question of whether New Hampshire could prosecute an individual for refusal to answer questions about a lecture at the state university.

Sweezy had refused to disclose his knowledge of the U.S. Progressive Party and to answer questions about his lecture in a humanities class. He was asked whether he had asserted "that socialism was inevitable, whether he had advocated Marxism, or whether he had espoused the theories of dialectical materialism."

In holding that Sweezy could not be prosecuted for refusing to answer, Chief Justice Warren, noted that:

> "The essentiality of freedom in the community of American universities is almost self-evident. **** To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. **** Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[26]

In a concurring opinion, Mr. Justice Frankfurter noted that:

> "When weighted against the grave harm resulting from government intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate.... **** For society's good -- if understanding is an essential need of society -- inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible."[27,28]

* * *

The Supreme Court's most significant pronouncements on academic freedom in the 1960's came in its 1967 decision in Keyishian vs. Board of Regents of the University of the State of New York.[29]

In Keyishian, state university faculty members challenged New York "teacher loyalty" laws. University trustees, acting under these statutes, had required faculty to verify they were not and had never been communists. The Court struck down the statutes as overbroad

and vague, in that no one could be held to understand what constituted "seditious" utterances and acts under the terms of the law.

But, more important, the Court once again noted that:

> "(O)ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ...."[30] [emphasis added].

Thus it was clear by at least 1967 that some sort of protection for some sort of academic freedom was provided somewhere and somehow under the 1st Amendment to the United States Constitution.

The line was not then, and is not yet, drawn as to where individual's rights to express opinion moves beyond the limits of Constitutional protection -- as, for example, when the expression of opinion becomes advocacy to unlawful action, or when the opinion is unrelated to the academic subject the institution might properly require be addressed.[31]

Another line yet to be drawn is where speech or conduct so impairs the effective work of an institution that its interests may prevail over those of the individual.[32] Lower courts have considered

whether conflicts within an academic institution involved protected speech or merely disruptive behavior. But these cases involve hopelessly complex factual disputes, most raising questions of freedom vs. responsibility (or, some might say, civility) that the Constitution simply can never resolve.[33]

* * *

In the late 1960's and the 1970's, as the status of students evolved from their historic condition as wards of academic institutions, there followed a growing recognition of student constitutional rights -- a form of "academic freedom" -- within these institutions.

Earlier, in Hamilton vs. Regents of the University of California (1934),[34] the Supreme Court found no deprivation of constitutionally-protected "liberty" when the University required male citizens to submit to military training. And in an even earlier precedent, the Court had upheld a Mississippi statute prohibiting students at state colleges from membership in Greek letter societies, holding that a state could so safeguard students from "distractious" influences and ensure their academic singleness of purpose.[35]

Then came the 1960's.

The most significant modern precedent in this regard was in the landmark decision in Tinker vs. Des Moines Independent Community School District.[36] Holding that a public school pupil could not be flatly barred from symbolic political expression (wearing an armband), the Court stressed that the 1st Amendment did not stop "at the schoolhouse gate."

With that principle very much in mind, the Court, in the 1972 case of Healy vs. James, held that while a public college might deny "recognition" to a group which refused to comply with reasonable campus regulations, and even (in 1969-1970) in a "climate of unrest on many college campuses in this country," the "precedents of this Court left no room for the view that, because of the acknowledged need for order, 1st Amendment protections should apply with less force on college campuses than in the community at large."[37,38]

In a pointed concurring opinion, Mr. Justice Douglas used the occasion to take a swipe at faculty everywhere, railing at "those who withered under the pressures of McCarthyism and other forces of conformity and represent but a timid replica of those who once brought distinction to the idea of academic freedom."[39]

And soon thereafter, in 1973, the Court held that a student could not be expelled from a public university for the distribution of a campus publication allegedly containing "indecent speech," noting that "the mere dissemination of ideas -- no matter how offensive to good taste -- could not be shut off at a state university campus in the name alone of 'conventions of decency'."[40,41]

* * *

While, generally, the Bill of Rights and the 14th Amendment protect the rights of individuals, the Supreme Court has also found, somewhere in the Constitution, a measure of protection for academic institutions as well. This was evidenced historically in the Dartmouth College and Girard cases. It was articulated more recently in a variety of other cases, beginning with Sweezy vs. New Hampshire. There, in his oft-quoted concurring opinion, Mr. Justice Frankfurter referred to the "freedoms of a University" including the freedom "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." (Quoting a statement from a conference on The Open Universities in South Africa.)[42]

No further explanation is made as to the constitutional basis for these institutional "freedoms" -- and we are left only to conclude that they arise from an other than "strict constructionist" reading of the 1st and 14th Amendments.

The institution's freedom to determine "who may be admitted to study," came squarely before the Court in the landmark 1978 case of Bakke vs. Regents of the University of California. The Court concluded that while that University's admissions program for minority students failed the applicable 14th Amendment "equal protection" test, the interest of an institution in seeking a diverse student body was "compelling." Mr. Justice Powell (for a fractured majority), wrote that:

> "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment," and that "the freedom of a university to make its own judgments as to education includes the selection of its student body."[43]

Likewise, in Board of Curators of the University of Missouri vs. Horowitz, a 1977 case which dealt only procedural questions but which nonetheless illustrates a point, the Court refused to impose formal adversarial procedures on a university for academic dismissals.

Justice Rehnquist expressed the Court's view that:

> "(W)e decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing. **** and (W)e decline to further enlarge the judicial pressure in the academic community and thereby risk deterioration of many beneficial aspects of the faculty student relationship."[44]

The principle that even public institutions are to be spared from governmental intrusion in certain academic decisions is thus well-written, if only tenuously grounded in a constitutional foundation.

In any event, here again, questions as to the limits of this institutional freedom and autonomy are unresolved. How far may government go, for example, in prescribing courses of study -- whether degree programs or course content itself -- at public institutions of higher education? How far may government go in limiting what a public institution may teach -- whether for fiscal or political reasons?[45] How far may government go in directing or coercing admission policies? And what gives ground when "assessment" and academic freedom collide, as they inevitably must?

* * *

In the 1980's, some decisions were notable more for their political than their legal importance. The Supreme Court did decline to defer to the collective interests of academic institutions (the NCAA) when they ran afoul of antitrust laws, but gave a narrow construction to a federal civil rights law at the behest of Grove City College. The Court also, however, rejected that College's argument that its "freedom" was unconstitutionally restrained by conditions attached to the receipt of federal funds. Such conditions -- including, in another case, required selective service registration for student aid recipients -- fall within the exercise of the Congress' spending power under Article I of the Constitution.[46]

More vexing was the question presented from Yeshiva University -- whether faculty were "managerial employees" under the National Labor Relations Act. But here too, economic interests were at stake, not academic freedom -- at least not as a constitutional issue.[47]

The Court also refused to accept the argument of Bob Jones University that its religious "freedom" was impinged by revocation of tax exempt status. That University's freedom was outweighed by the

overriding public interest in the enforcement of anti-discrimination laws.[48]

A more significant 1st Amendment controversy was presented in 1984 in Minnesota State Colleges vs. Knight.[49] There, the Court refuted an argument by independent-minded faculty that a Minnesota statute granting certain exclusive rights to a certified bargaining agent violated their constitutional rights. In so holding, Ms. Justice O'Connor noted that:

> "(T)his Court has never recognized the constitutional right of faculty to participate in policymaking in academic institutions. .... The faculty involvement in academic governance has much to recommend it as a matter of academic policy, but finds no basis in the constitution."[50] [emphasis added]

Three Justices dissented from this decision, Justice Marshall even commenting that "(I)n an appropriate case, I would be prepared to include within this collection of constitutionally-protected avenues of communication a measure of freedom on the part of faculty members as well as students to present to college administrators their ideas on matters of importance ... to the academic community."[51]

* * *

So after 200 years and thousands of conflicts -- cosmic and comedic -- what does it all mean, today?

Issues of academic freedom today are, by their nature, usually as complex as they are controversial. As O'Neil pointed out, today it is not even always clear "whose academic freedom is at stake."[52] It could often be said that one person's academic freedom is another person's petty annoyance, or that academic freedom is in the eye of the beholder. Rarely are the forces of good and evil, virtue and vice, enlightened and darkness, clearly lined up for their respective cheering sections.

Many such modern cases are intramural disputes -- between administration and faculty, between faculty and their departments or personnel committees or unions, between protesters and controversial speakers. These controversies blur moral and ethical issues -- much less legal issues -- and the application of constitutional principles cannot always yield clear and satisfying results.

Some have asserted that in 1987 contracts, institutional policies and academic custom may offer greater protection for academic freedom than constitutional laws. But it was not always thus.

It is also likely true, as O'Neil also points out, that under the constitutional doctrine of academic freedom "university professors will enjoy at least as much extramural freedom as do other government employees, but not necessarily more."[53]

So where are we left, then, with the constitutional protection of academic freedom?

First, there is loose in the land a dangerous and specious impression that because the mores of higher education have changed so dramatically since the turn of the century, because the House Un-American Activities Committee is dormant, because the 1st Amendment clearly does not "stop at the schoolhouse gate," that serious threats to academic freedom are but a bad memory.

But, threats do remain, albeit more subtle than in earlier times. There is reason to worry, for example, about restrictions on international travel and the exchange of information; there is reason to worry again about free speech and protests, and protests of protests, and reactions to both; and there is reason to worry when academic institutions become so dependent upon relationships with the

world of commerce -- witness recent events at the University of Rochester.

The Constitution may or may not provide the answers to these problems or full protection from these threats -- indeed, many of these threats come from within the academy itself. Still, the Constitution has provided and does provide a solid base of protection against at least patent political or authoritarian interference with free expression in the academic community.

It is now clear that politicians cannot summon teachers to account for unsettling opinions or unpopular associations; trustees may not purge from institutions those whom they may regard as irritating or even subversive; and alas, innocent presidents must endure, with cheerful restraint, the pitiless spears of student journalists, zealous protestors, union activists and even faculty gossips. And whether or not this provides academics with a great deal more protection than the citizenry at large, the 1st and the 14th Amendment protections are of special importance in the academic community.

Second, it must be remembered that Constitutional protection for academic freedom -- and for freedom of expression generally -- is a judge-made doctrine, and a fairly recent one at that. The controversy surrounding the proposed appointment of Judge Bork to the Supreme Court -- while unedifying in so many respects -- may have, if only inadvertently, yielded some useful insight into the nature of such constitutional protections.

If the words of the Constitution are nearly immutable, scholars and judges and politicians can and do hold widely divergent views on their meaning and application. There are few clear-cut expressions of constitutional empowerment or proscription about which differing views -- reasonable views -- cannot be heard.

Thoughtful people can and do differ as to what the 1st Amendment means in theory and application. And persons of intellect and noble intentions struggle daily trying to understand what the "equal protection of the laws" or the "due process of the law" under the 14th Amendment mean for public schools or persons accused of crimes.

By these processes of debate and litigation, the Constitution -- in principle and application -- changes, dramatically sometimes. And whenever five tenured Justices so decide, new rights can be created or -- to use Judge Bork's lovely term -- governmentally sponsored "gratifications" can be withheld or revoked.

Constitutional protections come neither from Olympus nor Sinai; they are human-made and hence fragile, precarious, sometimes ephemeral.

Still, an established judicial doctrine grounded in the Constitution is about the best guarantee available to citizenry in this temporal world. And clearly the language -- if not the holdings -- of decades of Supreme Court Justices has recognized and upheld the importance of free expression within the academic context.

Third, the recognition of a constitutional protection owed an academic institution is quite remarkable, even in the often astonishing field of constitutional jurisprudence.

Justice Frankfurter's articulation of the "four freedoms" of academic institutions is gratifying, though merely an expression of opinion that was not necessary or even relevant to the case before

the Court. More important, perhaps, was the holding in University of California vs. Bakke that the institution had certain interests that deserved constitutional deference -- there, the right to select "who may study." And that institutional right was held to be "compelling" -- a very important designation in 14th Amendment jurisprudence.

Exactly what this institutional academic freedom means has yet to be determined -- and perhaps in the end it will mean very little. But at minimum it suggests a quite remarkable interest in and protectiveness toward academic institutions by the Supreme Court.

Finally, it is by now obvious that academics, like their fellow citizens, sometimes expect too much from their Constitution and call upon courts to resolve matters -- some important, some petty -- for which courts are ill-suited.

Not every personnel decision, not every intra-departmental quarrel, not every rude gripe and not every exercise of authority involves the egregious deprivation of a constitutional right. And there will always be the questions of whether protest is disruption, whether criticism is whining, whether art is pornography, whether freedom to research is license to profit. These cases too often involve

hopelessly complex personal disputes with precious little relevance for high constitutional principles.

Academe simply must find better ways to resolve these issues. As a recent study pointed out,[54] without important legal principles at stake, litigation yields few winners and many losers.

* * *

Let me turn back to Justice Marshall. It may well be that in our eagerness to lionize the "Framers" of the Constitution -- if only because 200 is a round number and it was time for a celebration -- we missed the more important point. "The true miracle was not in the birth of the Constitution but in its (200-year) life."

There is a quote attributed to a Congressman Campbell: "What's the Constitution between friends." The answer is that it means a great deal between friends -- and even more between citizens who are seriously committed to the pursuit of truth and their fellow citizens and their government. It means a great deal because humans are not angels and, as Madison observed, government -- and a constitution -- would be unnecessary only if we were.

The Framers offered the form and structure of a government that would endure and, by and large, succeed -- not with flawless efficiency, not without subsequent sacrifice, not to effect true equity or even ensure maximum freedom, and not even, perhaps, for all of the best reasons. And their vision was not necessarily of a perfect and just society. They were concerned instead about power -- its uses and abuses -- and they approached this matter with a healthy skepticism about human nature.

The "genius" of their legacy -- if it dare be called that -- was not in providing for the perpetual protection of our rights and liberties, as we know and cherish them, but rather in ensuring our own capacity to do so. And in that sense, constitutional protection for academic freedom -- like all constitutional protections -- presents us with as much a challenge as a reassurance.

FOOTNOTES

[1]Excerpts from speech printed in Harper's, July, 1987, p. 17.

[2]Courts have not generally been willing to find some special privilege -- under the guise of "academic freedom" -- to protect academics from judicial compulsion to disclose evidence concerning peer review proceedings in personnel decisions. See e.g., In re Dinan 661 F. 2d 426 (5th cir., 1981, cert. den. 102 S.Ct. 2904 (1982); and also "Comment," 68 Iowa L. Rev. 585 (Mar., 1983). The asserted "privilege" to protect the confidentiality of peer review proceedings likewise prevents plaintiffs from proving claims of unlawful discrimination. See Mobilia, "The Academic Freedom Privilege: A Sword or A Shield," 9 Vermont L. Rev. 42 (1984).

To the contrary, see McKillop vs. Regents of the University of Chicago, holding that confidential or peer-review evaluations need not be disclosed in civil litigation because of the University's interest in maintaining confidentiality of its evaluation system which outweighed the interests in disclosure. 386 F. Supp. 1270 (N.D. Cal. 1975). See also Desimore vs. Skidmore College, 517 N.Y.S. 2nd 880 (1987).

[3]And, to be sure, the Constitution does not -- at least yet -- come between contending parties within private institutions. See Schmid vs. Princeton, 455 U.S. 100 (1982). See also, Note, "Testing the limits of academic freedom," 130 University of Pennsylvania L. Rev. 712 (1982) -- interpreting the Princeton University vs. Schmidt as raising a significant constitutional question of the First Amendment right of a private institution to control freedom of speech on its campus.

In "Private Universities and Public Law," 19 Buffalo Law Review 155 (1970), O'Neil argued that the original distinction between public and private institutions of higher education is traceable to the Dartmouth College case, where there was delineated a distinction between a "civil institution to be employed in the administration of government" and a "private eleemosynary institution," (17 U.S.--4 Wheat.--518, 647). O'Neil argues that the distinction between public and private institutions is a specious one, and that private colleges are "like other non-governmental institutions claim to be acting for or in the place of the state." The issue remains as to what is an appropriate gradation of constitutional application given the various governmental functions of "private" institutions.

[4]See McDonald, Forrest, "Intellectual Origins of the Constitution," University of Kansas, Press, 1985, p. 220.

[5]McDonald, p. 4.

[6]McDonald, p. 191.

[7]McDonald, p. 45-56.

[8]See Carley vs. Arizona Board of Regents, 737 P. 2nd 1099, Arizona App. (1987).

[9]See Lovelace vs. Southeastern Massachusetts University, 93 F. 2nd 419, (1st Cir., 1986).

[10]See Martin vs. Parish, 805 F 2d. 583, (5th Cir., 1986).

[11]See Meyer vs. University of Washington, 719 P. 2nd 98 (S.C. of Wash., 1986).

[12]U.S. Supreme Court decision, June 19, 1987.

[13]See Harvard Law School Forum vs. Schultz, 633 F. Supp. 525 (D. Mass., 1986).

[14]White vs. Davis, 13 Cal. 3rd 757, 120 Cal. Rptr. 94, 533 P. 2nd. 222, 231 (1975).

[15]See Students Against Apartheid Coalition vs. O'Neil, 660 F. Supp. 333 (W.D.V.A., 1987). Though in another case, a court strongly implied that a university could require that such shanties be removed at night -- it if had done so under the policies narrowly tailored to protect the institution's interests. See University of Utah Students Against Apartheid vs. Peterson, 649 F. Supp. 1200 (D. Utah, 1986).

[16]See Brown vs. Board of Regents of the University of Nebraska, 640 F. Supp. 647 (D. Neb., 1987).

[17]Stanley vs. Magrath, 719 F. 2d 279 (7th cir., 1983). Swope vs. Lubbers, 560 F. Supp. 1328 (W.D. Mich., 1983).

[18]See Sinn vs. Daily Nebraskian, 638 F. Supp. 143 (D. Neb., 1986), case involving refusal to publish roommate advertisements stating the gay or lesbian orientation of the advertisers.

[19]See Bok, Derek, "Beyond the Ivory Tower: Social Responsibilities of the Modern University," Harvard University Press, 1982, p.4.

[20]For comprehensive history of these developments, see Richard Hofstadter and Walter B. Metzger, "Development of Academic Freedom in the United States," Columbia University Press, 1955.

[21]Trustees of Dartmouth College vs. Woodward, 17 U.S. (4 Wheat) 518 (1819). For an analysis tracing the roots of a significant theory to this case, see: Campbell, 70 Kentucky L.J. 643, especially at 704-7095 (1981-1982). "Simply stated, the Dartmouth College doctrine was that the federal contracts clause protected private religious, quasi-religious and secular corporations from arbitrary state legislative attack. The Court thus partially established for the first time the constitutional principle of associational freedom and integrity in the context of the religiously and politically diverse and highly competitive early 19th-century American society."

[22]43 U.S. (Howard 2) 127 (1844).

[23]Berea College vs. Kentucky, 211 U.S. 45 (1908).

[24]Slochower vs. Board of Higher Education of New York City, 350 U.S. 551 at 558 (1956).

[25]354 U.S. 234 (1957).

[26]354 U.S. at 250.

[27]354 U.S. at 261-2.

[28]In Shelton vs. Tucker, 364 U.S. 479 (1960), The Supreme Court struck down an Arkansas statute which required every teacher, as a condition of employment at a state-supported college, to file annually an affidavit listing organizations to which he or she had belonged or contributed in preceding years. See also Whitehall vs. Elkins, 389 U.S. 54 (1967).

[29]See also Daggett vs. Bullitt, 377 U.S. 360 (1964) when the court struck down state statutes which required teachers in public institutions to execute a vague loyalty oath.

[30]385 U.S. 589 at 603 (1967).

[31]For example, the Court noted in Barenblatt vs. U.S., 360 U.S. 109 at 112 (1959), a case involving the refusal of an academic to repond to inquiries by a congressional committee about alleged Communist party activities at educational institutions:

> Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. **** But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.

[32]391 U.S. 563 at 568 (1968). Such an issue was presented in the public school context in Pickering vs. Board of Education, 391 U.S. 563 (1968). There a teacher published a letter in a newspaper criticizing the Board of Education and the superintendent. The Court, citing Keyishian, noted that "(T)he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, and commenting upon matters of public concern, and the interests of the state, as an employer, and promoting the efficiency of the public services it performs to its employees." More recently, the Court determined that when a public employee (in this case, an assistant district attorney) circulated an inter-office questionnaire purporting to assess the level of confidence of the staff in a supervisor, the interests of the state as an employer outweighed the employee's interest in freedom to speak. See Connick vs. Myers, 103 S. Ct. 1684 (1983).

[33]See e.g., Jawa vs. Fayetteville State University, 426 F. Supp. 218 (E.D.N.C., 1976); Clintwood vs. Feaster, 468 F. 2d 359 (4th cir., 1972); and Stasney vs. Board of Trustees 32 Wash. Ap. 239, 647 P. 2d 496 (1982).

[34]293 U.S 245 (1934).

[35]Waugh vs. Trustees of the University of Mississippi 237 U.S. 589 at 597 (1915).

[36]393 U.S. 503 (1969)

[37,38]408 U.S. 169 at 193 (1972) Later, litigation arose over the rights of other "controversial" student organizations to institutional "recognition" -- notably organizations of gay students. The lower courts have generally given these organizations full protection, citing Healy vs. James as authority. See Stanley, "The Rights of Gay Student Organizations," 10 J. Coll. & Univ. L., 397 (Winter, 1983-1984).

[39]408 U.S. at 196-7.

[40]Papish vs. Curators of the University of Missouri, 410 U.S. 667 (1973).

[41]Even more recently, in Widmar vs. Vincent, 454 U.S 263 (1981), when a public university had refused to grant the use of its facilities to a "registered student organization" for purposes of conducting religious worship of religious teaching, the Court held that once the institution had established a forum for student use, it could not then regulate the content of speech.

[42]354 U.S. at 263. For a more extensive treatment of this issue, see Finkin, "On Institutional Academic Freedom," 61 Texas L.R. Rev. 871 (Feb., 1983).

[43]438 U.S. 265 (1978).

[44]435 U.S. 78 at 90 (1977).

[45] See for example, Schneider, "Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom," J. Col. & Univ. L. 179 (Fall, 1984).

[46] NCAA vs. Regents of the University of Oklahoma, (1984); Grove City College vs. Bell, 465 U.S. 555 at 575 (1984); Selective Service System vs. Minnesota Public Service Research Group, 104 S. Ct. 3348 (1984).

[47]N.L.R.B. vs. Yeshiva University, 444 U.S. 672 (1980.

[48]Bob Jones University vs. United States, 461 U.S. 574 (1983).

[49]465 U.S. 271. (1984).

[50] Ibid.

[51] Ibid. at 293.

[52] O'Neil, "Academic Freedom and the Constitution," 11 J. Coll. & Univ. L. 275, 280 (Winter, 1984).

[53] Ibid.

[54] See LaNove, G.R. and Lee, B.A., "Academics in Court," University of Michigan Press, 1987.

[55] Federalist Paper #51.